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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-178

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, COMMISSIONER JOHN P. FRANKLIN, REV. H. H. BATTLE, MCCLELLAN COOK, MRS. C. M. HOOPER, JAMES L. JENKINS, EDWARD S. PROCTOR, and CORLEY R. YOUNG, members and JAMES W. HENRY, Superintendent,

Petitioner,

v.

JAMES JONATHAN MAPP, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

JAMES JONATHAN MAPP, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, the Board of Education of the City of Chattanooga, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 30, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto at pp. 66 to 83. The opinions of the District Court were rendered on February 4, 1972, 341 F. Supp. 193, and on July 26, 1971,

329 F. Supp. 1374, and are printed in the appendix hereto at pp. 50 to 65 and 21 to 49, respectively.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Sixth Circuit, sitting *en banc*, was entered on April 30, 1973. No petition for rehearing of that opinion was filed and this petition for certiorari was filed within ninety (90) days of April 30, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether the District Court correctly applied the proper legal standards enunciated in the school desegregation cases in:

1. Placing upon petitioner the burden of proof (initially going forward with the evidence and the ultimate burden) in resisting respondents' motions for further relief;

2. Confusing the distinction between the right and the remedy by inferring a status of default solely from admitted racial statistics without any proof or explanation of such statistics;

3. Ignoring completely the threshold question as to the necessity of default as a condition precedent to any consideration of a remedy, and along with the means permissible in effectuating an adequate remedy;

4. Ordering the petitioner to maximize integration, above all other factors, notwithstanding this Court's un-

qualified rejection of racial balance as a constitutional right; and

5. Construing the legal standards to require that the burden of proof could be met only by showing Board decisions (based upon race) made with the specific intent to maximize integration.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under 28 U.S.C. § 1343 (3) upon respondents' complaint based upon 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment. This suit was originally filed on April 6, 1960 by the respondents as a class action against the Board of Education of the City of Chattanooga, its members and superintendent, for the desegregation of the Chattanooga Public School System. Since filing the original complaint, respondents have from time to time filed various "Motions for Further Relief" seeking additional relief, relief often contradictory to the relief sought previously and relief based upon pleadings inconsistent with previous findings and opinions of both the District Court and the Court of Appeals. For example, on March 29, 1965, respondents filed a motion for further relief asking the District Court to order petitioner to operate its system "without regard to race."

The District Court received evidence in April and May of 1971 upon the respondents' motion for further relief and motion for immediate relief. Petitioner had the burden of proof to show that it was operating a unitary school system. Notwithstanding the fact that the respondents made the allegations as to racial discriminatory actions by the petitioner, the petitioner was forced to have the burden of initially going forward with the evidence. On the

completion of that evidentiary hearing, the District Court on May 19, 1971 orally ordered the petitioner to file an amended plan of desegregation which would maximize integration. That plan was submitted according to the instructions of the Court. The plan was approved, with the exception of the high school portion, after a hearing, and ordered implemented to the extent the Board had the necessary funds. (The petitioner does not have the power to raise funds and is dependent upon the City of Chattanooga for such funds as would be needed to provide student transportation. The City was not made a party defendant in this case until January 26, 1972.) From such approval the respondents first, and then the petitioner, appealed.

On October 11, 1972, a panel of the Court of Appeals for the Sixth Circuit voted two-to-one to remand the case to the District Court. The majority held that the District Court had erred on the burden of proof issue and stated several other guidelines for the District Court to follow in any further hearing upon the cause. Even though the Court of Appeals had initially refused to grant petitioner's suggestion that the case should be heard *en banc,* the Court of Appeals voted to hear the case *en banc* upon the respondents' suggestion after the adverse decision was rendered. After the rehearing on December 14, 1972, the Court of Appeals on April 30, 1973 entered a *per curiam* opinion in which seven judges voted to affirm the District Court. Two judges dissented and one judge concurred in the action of the majority, but did not approve all of the District Court's language and opinion. (A more complete statement of the facts is found in Petitioner's Brief filed with the Court of Appeals at pp. 5-16 inclusive.)

REASONS FOR GRANTING THE WRIT

Petitioner respectfully requests the Petition for Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit because the District Court applied incorrect legal standards by:

(1) Erroneously applying the guidelines in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) to the facts in the Chattanooga Public School System, and specifically:

(a) in applying the racial balance thrust of the remedy approved in *Swann* as the exclusive constitutional criteria for formerly dual systems, and thus ignoring completely the threshold question of default by directing attention to the required remedy without first determining the existence of a constitutional violation.

(b) emphasizing the supposed constitutional command to maximize integration, above all other factors, and in so doing reduced to a nullity this Court's absolute rejection of "any particular degree of racial balance" as a constitutional right.

(2) In such failure to interpret *Swann* correctly, the District Court's decisions are now in conflict with the decision of this Court in *Keyes* v. *School District No. 1, Denver, Colorado,* 41 U.S.L.W. 5002, decided June 21, 1973, particularly with reference to the nature of the presumption created by the presence of schools substantially disproportionate in their racial composition, the essentiality of segregative intent, and the recognition that it is possible to overcome such presumption of an unconstitutional act and resulting condition.

(3) As this Court recognized in *Swann* as a possible future necessity, school boards now desperately need a

further definition of guidelines as to their constitutional obligation to provide an equal educational opportunity. The District Court requested clarification on appeal. The petitioner raised ten issues in addition to those raised by the NAACP. The *en banc* decision of April 30, 1973 provided not one sentence of clarification.

Default

The abbreviated chronology that follows, considered alone, reflects that the District Court did not interpret *Swann* as requiring a factual finding of default upon the part of petitioner as the condition precedent to the necessity for the second step, that is, what constitutional means are "legally tolerable" for a District Court once total default is found as a fact.

Are the remedial racial means first permitted in *Swann* available only where school boards are found to be totally in default, or is *Swann* to be read as an expansion of *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954) and 349 U.S. 294 (1955) commanding all formerly statutory dual school systems (and now, since *Keyes, supra,* all school systems with segregative intent) to enforce racial decisions as a means available to eliminate racial segregation in public schools?

(The default aspect of *Swann* is covered in petitioner's reply brief at pp. 16-22 inclusive as filed with the Sixth Circuit.)

Chronology

1. On February 19, 1971, the District Court denied respondents' motion for summary judgment and set the case for evidentiary hearing upon respondents' motion for further relief filed December 31, 1968 and a motion for immediate relief on November 14, 1969. As invited by

the order of February 19, 1971, petitioner responded by objecting to the appropriateness of the burden of proof being placed upon petitioner, particularly when that burden was to prove, in effect, that the petitioner Board had taken the necessary affirmative steps to establish a unitary school system as to school zones, no zoning in high schools, transfers, faculty and construction (Joint App. Vol. I, p. 82). The uncertainty of meaning associated with this unitary school system concept, in addition to the burden of proof placed upon petitioner by the District Court, made the nature of the proof which could be adequate virtually impossible of achievement. Petitioner requested a pretrial conference prior to the hearing for purposes of clarification, but none was held.

2. Following the decision in *Swann* of April 20, 1971, petitioner filed a motion for summary judgment under Rule 56. The essence of the motion and accompanying brief was that *Swann* did not apply to the Chattanooga school system because it was not in default; and further that *Swann* held that decisions made solely or primarily upon race might be used in desegregation plans only where the petitioner Board was in default in the sense that the Charlotte Board was totally in default; and further that the burden of proof placed upon school boards in default "to satisfy the court that their racial composition is not the result of present or past discriminatory action" on their part, also did not apply to the Chattanooga Board. (See explanation of motion for summary judgment beginning at page 32 of brief for petitioner in the United States Court of Appeals for the Sixth Circuit.)

3. Frequent references during the course of the hearing by the District Court clearly reflect that no significance was attached to this motion nor the rationale supporting said motion by the District Court. To illustrate, references

to counsel for petitioner having admitted that the Board was not in compliance reflected no consideration of the default contention laid before the Court by the motion for summary judgment. Such admissions were clearly conditional upon a resolution of the default aspect of *Swann* as applicable to Chattanooga.

4. The initial decision of the United States Court of Appeals for the Sixth Circuit following the decision by this Court in *Swann,* was on June 22, 1971, *Goss* v. *Board of Education of City of Knoxville,* 444 F.2d 632. The District Court Judge filed an order on June 29, 1971 after the Amended Plan of Desegregation had been submitted to the Court on June 16, 1971 and attached to such order on June 29, 1971 a copy of the *Goss, supra,* opinion. The Court directed the petitioner to review its plan filed earlier on June 16, 1971 to the extent the language of *Goss, supra,* might appear to be applicable.

5. In response, on July 12, 1971, petitioner filed a motion under Rule 60 (b) asking the Court to vacate and set aside its orders of May 19, 1971 and June 23, 1971, and for a rehearing limited to faculty desegregation. Petitioner interpreted *Goss, supra,* as action by the Sixth Circuit limiting the means approved in *Swann* to school boards found totally in default by the District Court Judge. This motion to reconsider was denied in the July 26, 1971 decision by the District Court. *Mapp* v. *Board of Education of City of Chattanooga,* 329 F. Supp. 1374 (E.D. Tenn. 1971).

6. In the District Court's opinion, *supra,* the following language was used, reflecting findings of fact and conclusions of law.

The Court said, at page 1380:

> "The purpose of this lawsuit since its filing in 1960 has been to remove that dual system of schools and

replace it with a unitary system in which all vestiges of racial discrimination have been eliminated. In the intervening years very substantial progress has been made. *Following appellate guidelines as they then existed,* this Court believed upon each previous occasion it entered desegregation orders, first in 1962, then in 1965 and 1967, that all vestiges of the dual system of schools would be removed upon fulfilment of its orders and only a unitary system remain. Experience and *appellate redefinition of the concept* of a unitary school system have now mandated that further steps be taken to accomplish the full and final desegregation of the Chattanooga schools." (Emphasis ours)

At page 1381:

"It is also appropriate to note in this regard that both the administrative staff and the Chattanooga Board of Education are themselves fully desegregated, and this by voluntary or elective action. The Board of Education is comprised of seven members. Three of these members, including the Commissioner of Education, a duly elected official of the City of Chattanooga, are black. Four of the Board members are white. Three of the top school staff officials who testified at the hearings held recently were black, including the Assistant Superintendent of Schools and the Director of Teacher Recruitment."

Then at page 1387:

"Moreover, the evidence is undisputed that the defendants have heretofore administered their previous transfer plan in a manner that was wholly free from racial or other discrimination."

Then again at page 1387:

"There appears to be no purpose in multiplying restrictions for which no need or justification in fact exists. A school system that has voluntarily placed a

black staff member in charge of teacher recruitment and assignment needs no Court-imposed restrictions on potential forms of faculty discrimination which the record clearly and affirmatively shows it does not practice."

7. The above quotes reflect a recognition by the District Court that appellate courts have given new definition to the constitutional mandate of *Brown I* and *II*.

8. The above quotes are completely inconsistent with a finding of bad faith or even an intimation of bad faith upon the part of petitioner Board. Chattanooga is thus distinguished from Detroit, Nashville and Denver on an essential - segregative intent.

9. On February 4, 1972 in an opinion, *Mapp* v. *Board of Education of City of Chattanooga*, 341 F. Supp. 193 (E.D. Tenn.), the following quote appears at pages 200-201:

> "Turning finally to the motion for the allowance of attorney fees for all legal services performed on behalf of the plaintiffs since the filing of this lawsuit, the Court is of the opinion that the motion should be denied. In the absence of a showing of bad faith on the part of the defendants, the Court is of the opinion that the allowance of attorney fees would not be proper. *This lawsuit has been in an area where the law has been evolving, and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law.* For example, in all of its orders entered prior to the decision of the United States Supreme Court in the case of Green v. School Board of New Kent County, 391 U.S. 430, 88 S. Ct. 1689, 20 L.Ed.2d 716 (1968), this Court was itself of the opinion that genuine freedom of choice on the part of students in school attendance was compliance with the Equal Pro-

tection Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, *it further appears to the Court that when factual and legal issues have been resolved, the Board has at all times complied or attempted to comply in good faith with the orders and directions of the Court.* Accordingly, it has never been necessary for this Court to direct that outside persons or agencies, such as the United States Department of Justice or the United States Department of Health, Education and Welfare, enter into the lawsuit in aid of the development of a lawful plan of desegregation or in aid of enforcement. As recently as in its opinion entered upon July 26, 1971, the Court had this to say:

> " 'The wisdom and appropriateness of this procedure (i.e., looking to the School Board for the development of a desegregation plan) is further enhanced in this case by the apparent good faith efforts of the Chattanooga school authorities and the School Board to come forward with a plan that accords with the instructions of the Court and its order of May 19, 1971, and with the appellate guidelines therein cited.'
>
> "Under these circumstances the Court is of the opinion that an award should not be made taxing the defendant Board of Education with the plaintiff's attorney fees." (Emphasis added)

10. The actual findings reflected in the above quotes cannot be made consistent with a finding of default with respect to the Chattanooga Board.

11. In an addendum to the July 26, 1971 decision, *Mapp, supra,* at page 1388, the District Court had this to say:

> "Although the Court has tried earnestly to weigh the evidence and to follow the law, if errors have been

made by the Court in what has been here decided, judicial processes are available to correct those errors."

12. While the appellate court affirmed the District Court Judge in the *en banc* hearing which reversed the decision of the three-judge panel, no clarification or explanation was given to the District Court Judge in the course of the brief opinion. The ten issues raised by petitioner Board received not one sentence of explanation or clarification. Nor did the issues raised by the respondents. Only the dissent and concurrence developed any explanation.

13. At the time that the burden of proof was assigned to petitioner in February of 1971 by the District Court, the most recent decision in the Sixth Circuit with reference to *Brown I* and *II* was the case of *Kelley* v. *Metropolitan County Board of Education of Nashville and Davidson County,* 436 F.2d 856 which had been filed during December 1970. However, the opinion of the District Court in *Kelley, supra,* is replete with unqualified findings of fact to the effect that the Davidson Board had taken many actions based upon race for the purpose of creating or maintaining or resisting desegregation. There is no evidence and no factual findings by the District Court with reference to Chattanooga that can be placed in the same category as such referenced findings of fact as applicable to Davidson County.

14. *Bradley* v. *Milliken,* — F.2d — (6th Cir.) decided on June 12, 1973 with reference to the City of Detroit is replete with factual findings to the effect that the Detroit Board of Education "formulated and modified attendance zones to create or perpetuate racial segregation." (Slip Opinion, page 9) It was also found that the Board in Detroit in the operation of its transportation policy to

relieve overcrowding had admittedly bused black pupils past or away from closer white schools with available space in black schools (Slip Opinion, page 21). The Sixth Circuit summed up the constitutional violations of the Detroit School Board with this language at page 48, Slip Opinion:

> "The discriminatory practices on the part of the Detroit School Board and the State of Michigan revealed by this record are significant, pervasive and causally related to the substantial amount of segregation found in the Detroit school system by the District Judge."

Default is obvious, and based upon *current* board actions reflecting segregative intent.

15. In *Keyes, supra,* it is clear that the District Court found that the Denver School Board "had engaged in over almost a decade after 1960 in an unconstitutional policy of deliberate racial segregation with respect to the Park Hill schools." 41 U.S.L.W. 5002. There is ample additional factual findings in the opinions to indicate that the Denver School Board was making decisions upon the basis of race for the purpose of creating or maintaining segregation or minimizing desegregation. The presence of default is obvious.

16. This Court may not have had before it a factual situation from a formerly statutory dual school system which made an initial unqualified commitment to abide by the mandate of *Brown I* and *II* while attempting to maintain the viability of its school system, and a school board which could justify the factual findings referenced above by the District Court and affirmed by the Court of Appeals by inference.

17. *Brown I* focused upon the importance of education with these words:

> "Today, education is perhaps the most important function of state and local governments." (page 493)

18. In *Brown II,* with reference to implementation, school boards were given the following directive:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

19. When the record indicates that a school board has accepted this responsibility, and has discharged this responsibility in good faith, and has had its efforts in several stages approved by appellate courts, the harsh and experimental means permitted in *Swann* should not be required of such board upon the same basis as if it had made no effort to comply with the Constitution, and when such means may be inconsistent with the best judgment of the local school authorities whose responsibility for education is primary.

20. How can a school board be characterized as in the posture of default when the trier of the facts specifically finds said Board to have acted in good faith, and has specifically recognized that the constitutional principles appropriate to said board have been redefined in a field where the law is evolving, and this evolutionary aspect of the constitutional requirement is recognized by the District Court, appellate judges and by the Supreme Court of the United States?

21. The evolutionary aspect of the constitutional obligation of school boards is reflected in several instances by language used in *Swann.* At page 6:

> "Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines. This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of 'trial and error,' and our effort to formulate guidelines must take into account their experience."

Then again at page 14:

> "The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts."

22. The partial implementation of the plan approved on July 26, 1971 has resulted in a school system predominantly black although statistical data would indicate that the community served by petitioner Board still remains predominantly white when all ages are considered. The fears and the concerns and the uncertainty present in the Chattanooga system in the last several years is producing resegregation, and there is continuing evidence in various areas of the city that the resegregation will continue to move with the overwhelming power of a glacier to the point where *any* meaningful desegregation within the Chattanooga system will be token and without substance as to the equal educational opportunity envisioned by *Brown I* and *II*. Under such circumstances, how the constitutional rights of the black children in the Chattanooga area are to be provided remains an enigma if an all-black school is unconstitutional.

Maximize Integration

The District Court assigned such emphasis to the essentiality of student racial ratios, and upon a school-by-school basis, as to reflect only passing attention to that portion of *Swann* where this Court clearly stated that there is no constitutional requirement for a racial balance in public education. An examination of the July 26, 1971 opinion reflects a judicial procedure during the course of the drafting of this opinion that is structured in a racial ratio manner, and with each school deviation from the 70%-30% ratio requiring separate analysis and requiring some proof to justify the deviation from the racial ratio or balance suggested by Dr. Stolee, the expert witness for the NAACP.

As was made reference to in *The Supreme Court, 1970 Term,* 85 Harv. L. Rev. at page 83:

> "A district judge faced with pressures for a lesser degree of integration might justify his use of percentages by reference to *Swann*: since the Court has never approved a plan in which racial percentages varied more widely, *the only way to be sure of compliance with the constitutional command is to approximate Swann's scheme.*" (Emphasis ours)

The Burden of Proof

Keyes, supra, makes the intent of the school board the key factual determination as to the existence of a constitutional violation where actual racial student segregation admittedly exists in a Northern (*de facto*) school system (thus a system that has never practiced such segregation at the direction of a state statute).

Keyes, supra, requires the plaintiffs to carry the burden of proving (1) the necessary intent and (2) causal connection between such intent and the racial segregation giving rise to the inquiry. Once these two factors are

determined to be present "in a meaningful portion of a school system . . ." such establishes "a prima facie case of unlawful segregative design on the part of school authorities" and shifts the burden of proof to school authorities, to prove such segregation is not the result of intentionally "segregative actions." (41 U.S.L.W. 5002 at 5007)

Such principle must admit of (and permit) special circumstances within a single school system where unconstitutional segregation and constitutional segregation exist within that one system. And the sole distinguishing factor is either the board so intended and so caused the segregation or the board did not so intend.

Intent is the key.

Then take a look at a school board where substantial racial segregation continues, but where the record shows, and is unquestioned by both the District Court and the Court of Appeals, that there has been no intent to create or maintain such segregation since 1966. And, on the contrary, the record shows continued effort to achieve greater desegregation with stability and with due consideration of basic educational requirements; and where the Board did not interpret *Green, supra,* as a directive to reverse course and make decisions upon the basis of race as a remedial necessity. Proof of the absence of such intent will clear Denver, but not Chattanooga.

Brown I and *II* condemned racial segregation in public schools as resulting in inherently unequal educational treatment. The presence of state action, coupled with its direct causal relationship to such segregation, made the Fourteenth Amendment applicable and controlling. Intent was implicit in state statutes requiring racial segregation. Does the taint of this pre-1954 intent (expressed in a state law) continue to contaminate 19 years later despite a major effort to avoid such objectionable intent, *and* to remove the continuing effects of pre-1954 intent, but all the while

under severe restrictions as to the practical scope of the power available to a local school board? Racial segregation in public schools wherever it is to be found is objectionable and results in unequal treatment of children. However, such condition is not per se illegal for state action is a prime ingredient in order to trigger the protective force of the Fourteenth Amendment. In addition to state action there must be coupled a causal connection between such state action and the complained of racial segregation. Unless both are judicially found, the racial segregation is outside the scope of the Fourteenth Amendment and cannot be characterized as unconstitutional. Unfair? Yes, but not unconstitutional.

With the affirmance of the District Court's decisions by the *en banc, per curiam* opinion of April 30, 1973, the District Court's decisions are the only reality as to what the Constitution and *Brown I* and *II* mean to the petitioner and its constituency. Without consideration by this Court, the students within the Chattanooga system, and petitioner, will be denied the opportunity to negate segregative intent by appropriate proof.

Denver was found to have segregative intent as late as 1970, some 17 years after *Brown I*. Yet such has not yet required desegregation of the entire Denver system. And unequal racial student segregation exists. Petitioner, per the record, has had no segregative intent since 1966. Such segregation as continues to exist in petitioner's school system remains because of factors over which petitioner had no control as long as it was under injunctive command to avoid making decisions with reference to students upon the basis of race. Such was in response to and as a result of respondents' motion for further relief in 1965 requesting that all decisions be made "without regard to race."

Petitioner's actions reflect no intention to maintain segregation upon its part. Denver's segregation exists but

becomes unconstitutional only if the necessary intent is found as a fact coupled with the requisite causal connection. Denver will have adequate time to make preparation to meet this burden of proof. Petitioner has not had this opportunity, and without review by this Court, will never have such an opportunity. Thus the intent of a state legislature sometime prior to 1954 will continue to have its influence even though the petitioner as a Board has not possessed such intent since 1966, and has attempted to remove continuing effects of past intent with the tools at its command.

If petitioner had relied upon the burden of proof aspect of *Swann* as to justification of a plan, such could have had the effect of waiving the threshold question of default in *Swann*. And this posture would have served also to de-emphasize the importance of the default aspect. Petitioner believed its posture to be that of compliance.

Need for Guidance

Petitioner has been committed to compliance since 1955 enduring the hostility such commitment engendered. Petitioner seeks clarification of the nature of its constitutional responsibility based upon the facts existent in the Chattanooga community. The April 30, 1973 *en banc* decision by the Sixth Circuit overruling an earlier two-to-one decision by a three-judge panel indicates that able appellate judges read the same language and then interpreted such language in a contradictory manner. With such learned conflict in interpretation, it is next to impossible for a board such as petitioner to perform in accordance with the Constitution. And particularly when certain interpretations if applied would, in the judgment of petitioner, cause grievous harm to the school system and the quality of the available educational opportunity.

The Chattanooga situation is desperate. Unless clarification is provided quickly, the confusion will expand, the mistrust and misunderstanding will spread, resegregation will accelerate to the point where meaningful desegregation will not be possible within the system. Unless integration is defined and clarified as a constitutional goal with voluntary action an essential element, instead of forced integration, or desegregation, dis-integration of our public school system will be the result.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
E. D. TENNESSEE, S. D.

Civ. A No. 3564

JAMES JONATHAN MAPP, ET AL.,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, HAMILTON COUNTY, TENNESSEE, ET AL.

OPINION

(Filed July 26, 1971)

FRANK W. WILSON, Chief Judge.

This case is presently before the Court for settlement upon a plan that will accomplish full and final desegregation of the Chattanooga, Tennessee public schools in accordance with recent decisions of the United States Supreme Court and of the United States Court of Appeals for this Circuit. The case has a lengthy history. A recitation of that history is set forth in an opinion of this Court entered upon February 19, 1971, wherein the Court also set forth certain guidelines that were to be followed in conducting further hearings upon the present phase of the lawsuit. Pursuant to the guidelines referred to, extensive

further hearings were held regarding the effectiveness of prior desegregation plans to accomplish the establishment of a unitary school system in Chattanooga as that concept has been defined in recent appellate court decisions, including the decision of the United States Supreme Court in the case of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). At the conclusion of the evidentiary hearing on May 19, 1971, this Court entered an opinion from the bench finding that previous plans had not succeeded in accomplishing a unitary school system, basing its finding in this regard upon the undisputed evidence, and directing the defendants to submit further plans for the final accomplishment of a unitary school system in Chattanooga in accordance with the *Swann* decision and other recent appellate court decisions. Following the submission of desegregation plans both by the plaintiff and by the defendants, a further hearing was held upon July 19, 1971, at which evidence was received in support of and in opposition to the respective plans before the Court. Also at that time argument was received and a decision was reserved upon certain motions pending in the case.

PENDING MOTIONS

Turning first to the pending motions upon which decision has been reserved, these include:

(1) A motion by four citizens and residents of Chattanooga, Tennessee, to be allowed to intervene;

(2) A motion by the defendants seeking reconsideration of the Court's findings and order entered May 19, 1971, wherein the Court directed the defendants to submit further desegregation plans; and

(3) A motion by the defendants to strike the plaintiffs' objections to the defendants' desegregation plan.

Regarding the motion to be allowed to intervene, the intervenors assert various objections to the proposed desegregation plans submitted by the present parties to this litigation. The relief sought by the intervenors is to be allowed to present their objections to the desegregation plans now before the Court, to be allowed to join the Hamilton County, Tennessee, Board of Education as a party defendant, and to establish a uniform racial ratio in the combined City of Chattanooga and Hamilton County School Systems. The defendants have raised no objection to the intervention, but the plaintiffs have objected. Having considered the briefs and arguments of counsel, the Court is of the opinion that the motion to intervene must be disallowed and this for more reasons than one.

In the first place, it does not appear that the motion has been timely filed. This lawsuit has now been in litigation for more than 11 years. Extensive hearings and extensive relief has heretofore been granted and appellate review of that relief has been had upon three prior occasions. See Mapp v. Board of Education of City of Chattanooga, D.C., 295 F.2d 617 (1961); D.C., 203 F.Supp. 843 (1962); 6 Cir., 319 F.2d 571 (1963); 6 Cir., 373 F.2d 75 (1967); D.C., 274 F.Supp. 455 (1967). The present phase of the lawsuit has been in active litigation for more than a year. Evidentiary hearings extending over a period of ten days were completed within the past two months. Both the plaintiff and the defendants have now submitted desegregation plans. The motion to intervene came only seven days before a hearing was scheduled to commence for final approval of a desegregation plan which in part, if not in its entirety, must be implemented in the six weeks that remain before the opening of school in September 1971. To allow intervention at this advanced stage of the litigation, particularly intervention which seeks to add new parties, to litigate the legality as well as the propriety

of adding the new parties, and to litigate all relevant issues regarding a school system not presently before the Court, could only unduly burden and delay the present litigation. See Kozak v. Wells, 278 F.2d 104, (C.A. 8, 1960); Pyle-National Co. v. Amos, 172 F.2d 425, (C.A. 7, 1949), note, "The Requirements of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure," 37 Va.L.Rev. 563.

Insofar as the intervenors seek the right to interpose objections to the desegregation plans now before the Court it is believed that all matters in this regard are being vigorously and extensively contested by the present litigants. There is nothing in the record or history of this litigation to indicate any inadequate representation of any relevant viewpoint regarding any issue that has heretofore been before the Court or that is now before the Court. Rather, every issue throughout the long history of this litigation has been vigorously and resourcefully contested and has been resolved only by decision of the Court. In 11 years there has been no significant issue resolved by agreement of the parties. In this connection it may be further noted that while the intervenors are critical of the transportation provisions in the plans now before the Court, the proposed relief sought by them would require much more extensive transportation than proposed in any plan now before the Court.

Finally, insorfar as the intervenors seek to join the Hamilton County Board of Education and to establish a uniform racial ratio in the combined City of Chattanooga and Hamilton County School Systems, they appear to be asserting a new lawsuit based upon new and untested legal theories. No direct authority has been cited for the consolidation of two school systems by judicial fiat. Rather, such matters have historically been left for legislative, executive, or political resolution, all as borne out by the

numerous statutory citations in the intervenors' briefs, all of which without exception contemplate resolution by such means. Although the interventors assert that they do not seek consolidation, but only a joint unitary school plan, it does not readily appear how this would differ from consolidation when it is borne in mind that transportation and other facilities would be subject to joint use, and that staff, teachers and students would be subject to interchange between the systems. Likewise, the geographical, political or other limitations for determining which school systems might be joined for such relief is new matter upon which no prior authority appears to exist. Additionally, the entire matter of whether the Hamilton County School Systems was or was not itself operating a unitary school system would appear to be a subject for new litigation.

For all of the foregoing reasons the Court is of the opinion that the motion to intervene must be denied.

Taking up next the defendants' motion seeking reconsideration by the Court of its decision upon May 19, 1971, wherein the Court found that the present Chattanooga School System was not a unitary one as required by recent Supreme Court and other appellate court decisions, the motion is predicated upon the contention that the issue of whether the Chattanooga schools were unitary had been decided in the course of previous hearings and was therefore res judicata. The motion appears to be based largely upon the recent Sixth Circuit decision in the case of Goss v. Board of Education of City of Knoxville, Tennessee, (decided June 22, 1971) 444 F.2d 632. Although that case spoke of prior court findings of a unitary school system within the Knoxville schools, and suggested that upon traditional principles of res judicata such findings might constitute the law of the case, three matters must be noted in this regard. First, it must be noted that the Court went on to conclude: "We believe, however, that Knoxville

must now conform the direction of its schools to whatever new action is enjoined upon it by the relevant 1971 decisions of the United States Supreme Court." Second, it must be noted that in the face of prior findings of a unitary system, the Court of Appeals nevertheless remanded the case for redetermination by the District Court of the unitary school issue "consistent with Swann v. Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554, and other relevant Supreme Court opinions announced on April 20, 1971." Finally, as noted in the *Goss* decision, the law in the field of school desegregation has been in the process of development over the past 17 years, and concepts once thought adequate have been replaced by new and more definitive instructions from the Supreme Court. Findings of fact and conclusions of law based upon legal concepts now discarded form no basis for applying the principles of res judicata or determining the law of the case. The defendants' motion to reconsider will accordingly be denied.

Turning finally to the defendants' motion to strike the plaintiffs' objections to the amended plan for desegregation submitted by the defendants, it would appear that this motion might more appropriately be considered in connection with a review of the defendants' plan upon its merits, as will be hereinafter undertaken by the Court.

LEGAL GUIDELINES

At the conclusion of the hearing upon May 19, 1971, the Court in its opinion reviewed the relevant decisions of the United States Supreme Court and the Court of Appeals for this Circuit and set forth the legal guidelines that should direct the defendant School Board in preparing its plan for further and final desegregation of the Chattanooga schools. Without attempting again to repeat in

full those guidelines, it does seem appropriate again to refer to certain of those guidelines.

In the first place, the fundamental proposition bears repeating that the legal basis for this lawsuit is that provision of the Fourteenth Amendment to the United States Constitution which requires that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This Court is charged with the responsibility of requiring nothing less of the Chattanooga schools than full compliance with the Equal Protection Clause. This Court is permitted to require nothing more of the Chattanooga schools than such full Constitutional compliance.

In the second place, full compliance with the Equal Protection Clause of the Constitution requires the elimination from public schools of "all vestiges of state imposed segregation" and in this connection "the burden upon school authorities will be to satisfy the Court that their racial composition (*i. e.,* the racial composition of each school) is not the result of present or past discrimination upon their part." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). The responsibility of the Court is to assure that the Chattanooga schools "operate now and hereafter only unitary schools," that is, schools "in which no person is to be effectively excluded from any school because of race or color." Alexander v. Holmes County Board of Education, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969).

In the third place, while freedom of choice in matters of school attendance may have appealing features, "if it fails to undo segregation, other means must be used to achieve this end" and "freedom of choice must be held unacceptable." Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

Finally, it should be remembered that the initial responsibility for devising and implementing constitutionally adequate plans for the full and final desegregation of the Chattanooga schools lies with the school authorities and that "judicial authority enters only when local authority defaults." Swann v. Charlotte-Mecklenburg Board of Education, *supra*. It should accordingly be the purpose of the Court to leave unto the School Board the maximum discretion and responsibility for all phases of the operation of the Chattanooga Public Schools, limited only by constitutional requirements. Absent a constitutional violation, the wisdom or lack of wisdom of any plan or policy established by the Board is not a proper subject for judicial intervention or direction. The Court should not substitute its judgment for that of the School Board in areas where the exercise of judgment does not violate some principle of the law. Mapp v. Board of Education of City of Chattanooga, D.C., 203 F.Supp. 843 (1962), aff. 6 Cir., 319 F.2d 571.

PLANS FOR THE FINAL DESEGREGATION OF THE CHATTANOOGA SCHOOLS

Before undertaking an analysis and evaluation of the desegregation plans submitted by the respective parties, a statement of certain relevant historical matters and background data regarding the City of Chattanooga and its schools would be helpful. The City of Chattanooga, located upon the southeastern border of the State of Tennessee, was a part of the Southern Confederacy during the War Between the States. Although the City in modern times has become one of the most progressive and forward looking cities of the South, traditions of the past have their role and their influence. Memories of the past linger, with innumerable historical monuments marking the sites of some of the most significant events of the War Between

the States and with the City's rich lore of history being recalled by such names and places as Missionary Ridge, Lookout Mountain, Signal Mountain, Orchard Knobb, and Chickamauga Battlefield. Among other traditions inherited from the past, the City inherited the practice of operating a dual system of schools for its black and white citizens. Pursuant to the decision of the United States Supreme Court in the case of Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), this lawsuit was instituted. The purpose of this lawsuit since its filing in 1960 has been to remove that dual system of schools and replace it with a unitary system in which all vestiges of racial discrimination have been eliminated. In the intervening years very substantial progress has been made. Following appellate guidelines as they then existed, this Court believed upon each previous occasion it entered desegregation orders, first in 1962, then in 1965 and 1967, that all vestiges of the dual system of schools would be removed upon fulfillment of its orders and only a unitary system remain. Experience and appellate redefinition of the concept of a unitary school system have now mandated that further steps be taken to accomplish the full and final desegregation of the Chattanooga schools. As reflected by the undisputed evidence, a number of the Chattanooga schools remain racially identifiable.

Turning to certain relevant data, it may first be noted that the City of Chattanooga, according to the 1970 census, has a population of 118,661 persons. Of these 43,199 or 36.4% were black. These population statistics reflect that even in the face of some annexation by the City, there has been a net decline in the City's population since 1960 of 11,321 persons with all but 27 of this decline being in the white population. In the 1970-71 school year, the total school enrollment was 25,967 students. Of this total,

12,669, or 48.8% were black students and 13,298, or 51.2% were white students.

At the time of the recent evidentiary hearing upon the issue of compliance, the plaintiff submitted a plan for the desegregation of the Chattanooga schools. That plan is set forth in Exhibits 124 thru 135. In essence the plaintiff's plan calls for the establishment of a racially balanced faculty and staff in each school and the establishment of racial ratios among students in each school, with no school having less than 30% nor more than 70% of one race. The racial balance of faculty and staff in each school is to be accomplished by administrative assignment. The racial ratios among students is to be accomplished by rezoning, pairing, grouping and clustering elementary schools, by rezoning and reordering the feeder systems into the junior high schools, and by rezoning of the high schools. Extensive transportation of students, both to contiguous and non-contiguous school zones, would be required to effectuate the plaintiff's plan.

As stated in the legal guidelines set forth above, the initial responsibility for devising and implementing constitutionally adequate plans for full and final desegregation of the Chattanooga schools lies with the school authorities. Accordingly, before giving further consideration to the plaintiff's desegregation plans, it is appropriate that the Court should first turn its attention to the defendants' plan for desegregation of the Chattanooga schools. The wisdom and appropriateness of this procedure is further enhanced in this case by the apparent good faith efforts of the Chattanooga school authorities and School Board to come forward with a plan that accords with the instructions given by the Court in its order of May 19, 1971, and with the appellate guidelines therein cited. It is also appropriate to note in this regard that both the administrative staff and the Chattanooga Board of Education are themselves fully desegregated,

and this by voluntary or elective action. The Board of Education is comprised of seven members. Three of these members, including the Commissioner of Education, a duly elected official of the City of Chattanooga, are black. Four of the Board members are white. Three of the top school staff officials who testified at the hearings held recently were black, including the Assistant Superintendent of Schools and the Director of Teacher Recruitment.

Turning to the defendants' plan, a few words in regard to its organization are in order. The plan, as set forth in Exhibit 146, consists of an introduction, stating policy, Paragraphs 1 thru VIII, stating the plan, and Appendices A and B, setting forth the statistical justification and illustrating the plan. Illustrative school zoning maps for the elementary, junior high and high schools are shown in Exhibits 143, 144, and 145 respectively.

No criticism of the enrollment projections set forth in Paragraph I of the plan are made by the plaintiff and none are found by the Court. This portion of the plan is accordingly approved.

Paragraph II of the plan, when read in conjunction with the statistical data set forth in Appendix A and the illustrative matter set forth in the school attendance zone maps (Exhibits 143, 144 and 145) defines the new proposed student attendance zones and sets forth the methods proposed for accomplishing full and final student desegregation. The sufficiency of [sic] insufficiency of these proposals can best be determined by considering the elementary, junior high and high school plans in order.

Elementary Schools

During the school year 1970-71, the Chattanooga School System operated 33 elementary schools. Of the ten former black elementary schools within the system, four remained

all black and a total of only 30 white students attended the other six. In the 23 former white elementary schools there were 13,250 white children and 3,446 black children. Four former white elementary schools (Cedar Hill, Normal Park, Pineville, and Rivermont) remained all white. Barger had only two black students and East Lake had only three black students. Two former white elementary schools (Avondale and Glenwood) had changed to all black schools, having only three white students between them. The remainder of the former white elementary schools had ratios of black students varying from a low of 4% to a high of 64%.

The School Board proposes the accomplishment of a unitary system within the elementary schools by the closing of five elementary school, by the pairing of 16 elementary schools, by the clustering of six elementary schools, by the rezoning of three elementary schools, leaving the attendance zones of only three elementary schools unchanged. The overall result of the defendants' plan is to achieve a racial ratio of not less than 30% nor more than 70% of any race in each elementary school within the system with but five exceptions (Barger—20% black and 80% white; Carpenter —86% black and 14% white; Long—16% black and 84% white; Rivermont—12% black and 88% white; and Sunnyside—15% black and 85% white). These five schools will be discussed further shortly.

Turning first to the five elementary schools that are proposed for closing, three were substantially all black last year (Davenport, Glenwood, and Trotter), one was substantially all white last year (Cedar Hill), and the fifth (Amnicola) had a majority of black students but was quite small. No meritorious objections are believed to have been raised by the plaintiffs to the selection of schools for closing. Furthermore, their closing contributes to the overall plan for desegregation and sound fiscal, safety, and administra-

tive reasons were given by school authorities for each school so selected for closing.

With regard to the five elementary schools that will retain racial ratios of less than 30% or more than 70% of one race, the Court is of the opinion that the Board has carried the burden of establishing that their racial composition is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such result is the consequence of demographic and other factors not within any reasonable responsibility of the Board.

Barger, having a proposed racial ratio of 20% black and 80% white, is paired with Sunnyside with the effect of giving that school a racial ratio of 15% black and 85% white. These schools, particularly Sunnyside, are located in an area of the City where the residential patterns are rather rapidly becoming more black. The completion of housing projects now in progress in the area will speed up this trend. No purpose of discrimination appears with regard to pairing of these two schools. Rather, sound planning for the elimination of racial discrimination supports the plan of the Board in this regard.

Carpenter, having a proposed racial composition of 86% black and 14% white, is located within a sizeable area of the City that has a heavily black private residential pattern. Further, due to commercial expansion and expansion of the University of Tennessee within this area, and the consequent decline of elementary students, Carpenter is scheduled for closing within one or two years. Not only will time shortly remove any problem at Carpenter, but the inclusion of the school in some pair or cluster at this time would only serve to shortly impair the overall plan.

Elbert Long, having a proposed racial ratio of 16% black and 84% white, is located on the eastern extremity of the

City. It is located within a sizeable area of the City having a private residential pattern that is substantially white. There are no contiguous areas having a significant number of blacks, other than possibly areas outside the present municipal limits. Any significant annexation that may occur is likely to occur within this area and will include additional blacks. No purpose of discrimination appears regarding the zoning of this school.

Much that has been said regarding the Elbert Long School, which is also true of the Rivermont School, which under the defendants' plan will have a racial ratio of 12% black and 88% white. This school is located in the northern extremity of the City, and was recently acquired from the County by annexation. At the time it was acquired, it was all white and remained all white during the past school year. To accomplish desegregation the defendants propose to close Amnicola School, which is located across the Tennessee River, and place those students in Rivermont. This involves transportation of students for a substantial distance, but is nevertheless the nearest area having any significant black residential population. No purpose of discrimination appears regarding the consolidation and rezoning of these schools.

All 27 of the remaining elementary schools not heretofore discussed will have racial ratios of not less than 30% nor more than 70% of any race in each school. The Court has carefully reviewed the treatment proposed for each school, together with all statistical demographical and other data available in the record. To the extent that any student racial imbalance exists in any of the elementary schools, the Court is of the opinion that the Board has carried the burden of establishing that such racial imbalance as may remain is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such

limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency.

The Court is accordingly of the opinion that the defendants' plan for desegregation of the Chattanooga elementary schools will eliminate "all vestiges of state imposed segregation" as required by Swann v. Charlotte-Mecklenburg Board of Education, *supra*. Under these circumstances, it is accordingly not necessary for the Court to consider other or alternate plans. Likewise it would not be proper for the Court to pass judgment upon whether another plan would accomplish a "better" result from the viewpoint of educational policy and apart from any issue of legality.

Junior High Schools

During the school year 1970-71, the Chattanooga School System operated 12 junior high schools. Of the four formerly black junior high schools within the system, two remained all black and a total of only 9 white students attended the other two. In the eight formely white junior high schools, there were 3,341 white students and 908 black students. One formerly white junior high school (East Lake) had only one black student. The remainder of the formerly white junior high schools had ratios of black students varying from a low of 8% to a high of 70%.

The School Board proposes the accomplishment of a unitary system within the junior high schools by closing two junior high schools and by rezoning the remaining ten junior high schools, tying them into the restructured elementary school system. The overall result of the defendants' plan is to achieve a racial ratio of not less than 30% nor

more than 70% of any race in all but three junior high schools. Those three schools are Hardy, with 73% black and 27% white, Dalewood, with 29% black and 71% white, and Long, with 15% black and 85% white. Further discussion will be given to these three schools.

Turning first, however, to the two junior high schools that are proposed for closing, one is a former black school and the other is a former white school. The former black school, Howard Junior High School, was all black last year. The former white school, Lookout Junior High School, was 37% black and 63% white last year. No objections were raised by the plaintiffs to the selection of schools for closing. The Board represents that the closing of Howard Junior High School was necessary to the effectiveness of their overall plan. They represented that the closing of Lookout Junior High School was necessary in order to obtain desegregation of Alton Park Junior High School, one of the former all black junior high schools. Alton Park is stated to be a new school with greater capacity, whereas Lookout is one of the older and smaller junior high schools. Furthermore, financial economies, along with optimum development of quality instruction programs, were given as additional reasons for the selection of the junior high schools to be closed.

Turning to the three junior high schools that will retain a racial ratio of less than 30% or more than 70% of one race, Hardy Junior High School is expected to have a ratio of 73% black and 27% white. Until 1965 Hardy was an all white school. Changing residential patterns have gradually changed the racial composition of the school to its present pattern. The proposed zone for Hardy is bounded by obstacles to its enlargement, including Missionary Ridge on the east, the Tennessee River on the west, the city limits on the north, and predominantly black residential areas on

the south. Under all of these circumstances, the Court is of the opinion that the Board of Education has carried the burden of establishing that such racial imbalance as remains at Hardy Junior High School arises from conditions beyond the responsibility of the Board and is not the result of any present or past discrimination on the part of the Board or of any state agency.

Dalewood Junior High School, a former white school, is expected to have a ratio of 29% black and 71% white under the present plan. However, the trend in residential patterns in the zone is toward increasing the black population. Apartments now under construction will shortly increase the ratio of black students to a point in excess of 30%. No purpose of discrimination appears in the zoning of the Dalewood Junior High School.

The final junior high school having a ratio in excess of 70% is the Elbert Long Junior High School. Under the defendants' plan this school will have a racial composition of 15% black and 85% white. Everything that the Court has heretofore said in regard to the Elbert Long Elementary School is applicable to the junior high school. Additionally, the Elbert Long Junior High School is the smallest junior high school in the system, having an enrollment of only 166 students.

All of the remaining junior high schools not heretofore discussed will have ratios of not less than 30% nor more than 70% of any race in each school. The Court has carefully reviewed the proposed racial composition of each school and all of the relevant statistical, residential, demographical, and other data available in the record. The Court has also considered the manner in which the junior high schools are tied into the elementary school plan which the Court has hereinabove approved. In this connection the Court cannot overlook the fact that it is a matter of great importance to proper school administration that school

authorities be able to make reasonably reliable forecasts of school enrollments. To do this there needs to be a carefully devised system of feeder schools. In the light of all the record, the Court is of the opinion that the junior high school plan as submitted by the defendants removes all state created or state imposed segregation. To the extent that any student racial imbalance exists in any of the junior high schools, the Board has carried the burden of establishing that such racial imbalance as remains is not the result of any present or past discrimination upon the part of the Board or upon the part of other state agencies. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendants' plan for desegregation of the Chattanooga junior high schools will eliminate "all vestiges, of state imposed segregation" as required by the *Swann* decision. It is accordingly unnecessary to consider other or alternate plans.

High Schools

During the school year 1970-71, the Chattanooga School System operated five high schools. These included four general curricula high schools and one technical high school. Kirkman Technical High School offers a specialized curricula in the technical and vocational field and is the only school of its kind in the system. It draws its students from all areas of the City and is open to all students in the City on a wholly nondiscriminatory basis pursuant to prior orders of this Court. Last year Kirkman Technical High School had an enrollment of 1218 students, of which 129 were black and 1089 were white. The relatively low en-

rollment of black students was due in part to the fact that Howard High School and Riverside High School, both of which were all black high schools last year, offered many of the same technical and vocational courses as were offered at Kirkman. Under the defendants' plan these programs will be concentrated at Kirkman with the result that the enrollment at Kirkman is expected to rise to 1646 students, with a racial composition of 45% black students and 55% white students. No issue exists in the case but that Kirkman Technical High School is a specialized school, that it is fully desegregated, and that it is a unitary school.

While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that time the black high schools were zoned, but the white high schools were not. When the dual school system was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1435 and Brainerd having 184 black students out of an enrollment of 1344 during the 1970-71 school year. However, both Howard, with an enrollment of 1313, and Riverside, with an enrollment of 1057, remained all black. The freedom of choice plan "having failed to undo segregation * * * freedom of choice must be held unacceptable." Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The School Board proposes to accomplish a unitary school system within the high schools by zoning the four general curricula high schools with the following results in terms of student ratios:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

The plaintiffs have interposed objections to the defendants' high school plan upon the ground that it does not achieve a racial balance in each school. To some extent these objections are based upon matters of educational policy rather than legal requirements. It is of course apparent that the former white high schools, particularly Brainerd High School, remain predominantly white and that the former black high schools remain predominantly black. However, the defendants offer some evidence in support of the burden cast upon them to justify the remaining imbalance. The need for tying the high school zones to feeder junior high schools is part of the defendants' explanation. Residential patterns, natural geographical features, arterial highways, and other factors are also part of the defendants' explanation.

A matter that has given concern to the Court, however, and which the Court feels is not adequately covered in the present record, is the extent to which the statistical data upon which the defendants' plan is based will correspond with actual experience. Among other matters there appears to be substantial unused capacity in one or more of the city high schools. Before the Court can properly evaluate the reliability of the statistical data regarding the high schools,

the Court needs to know whether the unused capacity does in fact exist and, if so, where it exists, whether it will be used and, if so, how it will be used. It would be unfortunate indeed if experience shortly proved the statistical data inadequate and inaccurate and this Court was deprived of the opportunity of considering those matters until on some appellate remand, as occurred in the recent case of Davis v. Board of School Commissioners of Mobile, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

The plaintiff has submitted a high school plan with high school zones which the plaintiff's witness has testified will achieve a racial balance in each high school. However, this plan is not tied into the junior high school plan hereinabove approved and the Court is unable to say whether it could be so tied in. Furthermore, the same statistical problem discussed above would appear to exist with regard to the plaintiff's plan.

The Court accordingly is unable to give final approval to a high school desegregation plan at this time. Time, however, is a pressing factor. Pre-school activities will commence at each high school within less than a week, if in fact they have not already commenced. Full commencement of the fall term is only one month away. It is clear that the high schools must move at least as far as is proposed in the defendants' high school plan. Accordingly, the Court will give tentative approval only at this time to the defendants' high school plan in order that at least as much as is therein proposed may be placed into operation at the commencement of the September 1971 term of school. Further prompt but orderly judicial proceedings must ensue before the Court can decide upon a final plan for desegregation of the high schools.

In the meanwhile, the defendants will be required to promptly provide the Court with information upon the

student capacity of each of the four high schools under discussion, upon the amount of unused space in each of the four high schools, the suitability of such space for use in high school programs, and the proposed use to be made of such space, if any. In this connection the defendants should likewise advise the Court regarding its plan as to tuition students. Last year almost one-third of the total student body at City High School were non-resident tuition paying students. There is no information in the present record as to the extent the Board proposes to admit tuition students nor the effect this might have on the racial composition of the student body. The Court has no disapproval of the admission of tuition students nor to the giving of preference to senior students in this regard, provided that the same does not materially and unfavorably distort the student racial ratios in the respective schools. Otherwise, the matter of admitting tuition students addresses itself solely to the discretion of the Board. No later than the 10th day of enrollment the defendants will provide the Court with actual enrollment data upon each of the four high schools here under discussion.

TRANSPORTATION

The defendants propose to make available limited transportation for some elementary and junior high school students. Under the defendants' plan elementary school students will continue to report in the morning and depart in the evening from their nearest elementary school. School sponsored transportation will be provided to and from the paired and clustered schools and to those students living more than one and one-half miles from their nearest school. On the junior high level transportation will be provided only to students living more than one and one-half miles from the school to which they are assigned. No school

sponsored transportation is proposed for high school students.

The estimate of total capital outlay and operating expenses for the transportation proposed is $468,126.00. While this is a burden for a city, which, like all cities, is faced with revenue shortages, a substantial portion of the transportation expense is borne by the State. No estimate was placed in the record of the economies to be effected or the savings to be made by the consolidation of schools and the closing of five elementary schools and two junior high schools, but these savings will doubtless be substantial.

The defendants' transportation proposals are substantially less than those proposed by the plaintiffs. No cross-town busing is proposed by the defendants. The Court, however, believes that the defendants' transportation proposals are adequate to assure fulfilment of all student desegregation plans heretofore approved. Accordingly, the defendants' proposals in this regard are approved.

REMAINING PROVISIONS OF THE DESEGREGATION PLAN

There remain to consider those portions of the defendants' plan as set forth in Paragraph III thru VIII of the plan. Paragraph III of the plan provides for non-discriminatory practices in educational programs and in extra-curricular activities. No objection was raised to this portion of the plan and the Court is of the opinion that it is adequate to avoid any discrimination in these areas. Moreover, the evidence does not indicate that any such discrimination is now being practiced within the Chattanooga School System, but rather bears out the testimony of the defendants' witnesses that all such practices have heretofore been eliminated.

Regarding student transfers, the defendants propose in Paragraph IV of their plan to greatly simplify their previously complex student transfer plan and provide for transfers only in the following situations: (a) the majority to minority transfers, as required by the *Swann* decision, (b) the non-discriminatory transfer of orthopedically handicapped children, (c) the non-discriminatory transfer of students eligible for special education programs, and (d) permission for students, upon moving their residence to another zone within the school year, to elect to complete a school year in the school of their initial assignment. The transfer provisions appear to be wholly free of any potential for discrimination. Moreover, the evidence is undisputed that the defendants have heretofore administered their previous transfer plan in a manner that was wholly free from racial or other discrimination. Nor was it in any manner used to avoid desegregation, although the potential for such use may have existed to an extent beyond that possible under the proposed transfer plan. Paragraph IV of the defendants' plan will be approved.

The defendants' plan for desegregation of faculty and other staff as contained in Paragraph V provides for the assignment of teachers and staff to each school in ratio to their existence within the system and in a manner so as to avoid any racial identification of one school from another. Other provisions to avoid racial discrimination in the recruitment, assignment, reassignment, promotion, and demotion of teachers and staff are made. The provisions of the defendants' plan in this regard appear to provide for removal of all vestiges of racial segregation in matters of staff and faculty. The plaintiff proposes that a number of additional provisions be added that are intended to regulate potential discriminatory practices which the record shows clearly are not and have not been practiced with the Chat-

tanooga School System since its desegregation under prior orders of the Court. There appears to be no purpose in multiplying restrictions for which no need or justification in fact exists. A school system that has voluntarily placed a black staff member in charge of teacher recruitment and assignment needs no Court-imposed restrictions on potential forms of faculy discrimination which the record clearly and affirmatively shows it does not practice.

Paragraph VI of the defendants' plan, relating to school construction and site selection, provides that such activities shall be conducted in a manner to avoid a reoccurrence of a dual school system and that any proposal in this regard shall be subject to judicial review regarding its legality before it shall be implemented. The evidence reflects that no site selection, construction, or proposed construction is presently pending or in the offing. While somewhat different wording of the defendants' plan in this regard is urged by the plaintiff, the Court is of the opinion that the defendants' proposal adequately fulfils the requirements of the law in regard to school construction and site selection. This provision of the plan will accordingly be approved.

Finally, Paragraph VII of the defendants' plan proposes a continuation of the practice of annual reporting of desegregation statistics. The defendants' plan, however, is limited to an additional report in October of 1971. It is believed that the plan must be amended to provide for the continuation of such annual reports until a final order of compliance may be entered.

IMPLEMENTATION OF PLAN

There remains to consider the matter of implementation of the various provisions of the plan for desegregation hereinabove approved by the Court. No lawful or judicially acceptable reason appears why the provisions of the

plan hereinabove approved should not be implemented in time for the commencement of the 1971-72 school term; provided, however, that in implementing any portion of the plan regarding student assignments in the elementary and junior high schools as is dependent upon acquiring, staffing, and scheduling transportation facilities not now available to the schools, may be delayed until such facilities can be made available in the prompt, orderly, and necessary course of school and governmental affairs and can be placed in use with a minimum of disruption to the educational program. It appears undisputed in the record that the defendant does not now have available the facilities for accomplishing the transportation requirements of its plan. It is likewise established in the record that such facilities cannot be financed, acquired, staffed, and routed within the short time that remains before the commencement of school in September 1971, without total disregard for all orderly processes of government. The defendants will accordingly be permitted to implement such portions of its elementary and junior high school plans as may be feasible with the transportation facilities reasonably available to it at the commencement of the September term of school, and will be permitted to delay the implementation of any remaining portions of the said student assignment plans in the elementary and/or junior high schools until the transportation facilities necessary therefor can be acquired in the prompt but orderly process of school administration and of local governmental affairs, and until such facilities can be placed in use with safety and with a minimum interruption to the education program. As soon as the defendants can formalize their plans in this regard, and in no event later than within 30 days, the defendants will advise the Court of their proposed implementation schedule in accordance with the foregoing.

Having considered and decided all issues appropriate for decision at this time, the defendants will prepare and submit an order in accordance with this opinion.

ADDENDUM

The legal decisions in this case are for the present completed. A few further words, however, seem in order. This Court would hope that its opinion might be read with an effort at understanding by those who have an interest in the problems here discussed. Although the Court has tried earnestly to weigh the evidence and to follow the law, if errors have been made by the Court in what has been here decided, judicial processes are available to correct those errors.

If understanding of the legal basis for the decisions heretofore made cannot be given, then the Court can only appeal to the conscience of the community for that understanding.

As anyone who has kept up with public affairs in recent times must know, Chattanooga is not being singled out for special judicial treatment. One has but to read to know that most of the major cities of this Nation are contending with the problems here being judicially dealt with. The City of Chattanooga can never expect to remain an island within the Nation living in the pre-Brown v. Board of Education era, when the rest of the Nation is moving into the post-Brown v. Board of Education era. This City has made great progress in racial affairs in recent years. Though some were opposed at the time to that progress, few would now publicly propose that the racial clock be run back in Chattanooga to where it stood in 1960, and none would suggest that it be run back to where it existed a century ago.

This Court is not insensitive to the fears and anguish expressed by some within the City in recent days, nor does it relish the abuse and worse that has been so abundantly shared by word and letter, but this Court would be unworthy of trust in the least of its functions if it were to allow these things to cause it to deviate in the least from its sworn duty to uphold the Constitution and the laws as that Constitution and as those laws have been duly established and interpreted by the properly constituted authorities, including the United States Supreme Court and the Appellate Court under which this Court functions. How could anyone expect this Court to uphold a law of Congress regarding robbery of a bank, but in the face of public misunderstanding and criticism, turn its back upon the Constitutional requirement that all citizens be treated equally before the law?

There may well exist basis for criticism of the interpretation placed upon the Equal Protection Clause by the United States Supreme Court as it applies to public schools. But there can be not the least doubt that this Court, as well as every Court in the Nation, is bound by that interpretation. Furthermore, who is so certain of the correctness of his own views of the Equal Protection Clause that he would be willing to swap places in the social and racial scheme of affairs in our society? How many are so convinced of the correctness of their own interpretation of that clause that they would be willing to live in a society in which each man is free to make his own interpretations of all laws? Surely thoughtful men must agree that the rule of the law is the single greatest achievement of the centuries' long struggle for freedom.

This City can continue upon the path of orderly progress and racial harmony in all of its affairs, including the operation of its schools. This City can live within the law. This

City can maintain and improve its program of quality education for all children within its schools. This City can have one of the finest school systems within the State or within the Nation, but it first must believe that it can. It first must want the finest schools for its children. Medieval Florence, a miserable hovel of a City compared with modern Chattanooga, gave America its name and the world the Renaissance. But it did it only because its leaders and its people believed that it could be done and willed that it should be done.

Equal protection of the law might not seem so heavy a burden for anyone to carry if he felt that it were truly his brothers's child who was asking for it. Quality education might not seem so difficult for anyone to maintain if it were truly his brother's child that was being deprived or handicapped by its denial.

This City has seen its share of law violators, racial disharmony, fear, and distress in recent weeks and months. For those who believe that defiance of the law can be replaced with willing obedience, for those who believe that racial strife can be replaced with racial harmony, for those who believe that fear can be replaced with trust, for those who believe that quality education can be maintained and enlarged within the Chattanooga Public Schools, for those who believe that mankind can live in peace and harmony with his fellowman, for those who believe in the essential brotherhood of man, the bell tolls now.

UNITED STATES DISTRICT COURT
E. D. TENNESSEE, S.D.

Civ. A. Nos. 3564 and 5954

JAMES JONATHAN MAPP ET AL.

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, ET AL.

OPINION

(Filed February 4, 1972)

MEMORANDUM AND ORDER

FRANK W. WILSON, Chief Judge.

This case is presently before the Court on a motion filed on behalf of the defendants reciting that upon January 14, 1972 an order was entered in a state court case entitled John E. Grannon, [sic] Jr. v. City of Chattanooga, Tennessee, et al., No. N-15967 in the Circuit Court for Hamilton County, Tennessee, wherein the City of Chattanooga and certain officials of the city were enjoined from making available any funds for transportation of school students "to achieve a racial balance within the Chattanooga public school system" from and after thirty days from the entry of the state court order. Interpreting the state court order and the stated intention of officials of the City of Chat-

tanooga that they expect to comply with that order without appeal, as interfering with or forbidding the defendant from complying with the plan for establishing a unitary school system as required by the Equal Protection Clause of the United States Constitution and as heretofore approved by order entered in this cause, the defendants seek the instructions of this Court.

It is of course readily apparent what those instructions must be. A brief recitation of the history of this litigation will serve to render obvious what must be done. This case, seeking the desegregation of the public schools of the city of Chattanooga, Tennessee, has been in various stages of litigation since 1960. Extensive hearings have been held and orders entered, which orders have now been approved upon appeal upon three occasions. Hearings extending over a period of weeks were held upon the present phase of the case in the spring and summer of 1971. These hearings resulted in an order being entered instructing the defendants to submit a further plan for the desegregation of the Chattanooga city schools, such plan to be in accordance with the controlling appellate court decisions, including the decision of the United States Supreme Court in the case of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). In addition to these general instructions and by way of interpretation of these appellate court mandates, this Court gave the following directions to the Board:

Now in that connection, I read the *Swann* case as holding that the establishment of any exact racial balance in the schools is not constitutionally mandated. Likewise, the use of means to accomplish desegregation, such as, for example, bussing the students to accomplish an exact racial balance, is not constitutionally mandated. But these factors are matters which should be considered in every case. And, as I

have said, the Court goes on to say that when it does appear that there are schools which do not have some reasonable balance in relationship to the total population of the school, the school board 'has the burden of showing that such school assignments are genuinely non-discriminatory.'

* * * * *

. . . A unitary school system as I understand it, is just simply a system in which no segregation exists by reason of any past action of a school official . . . or by reason of any present action of the school board or officials, or any lack of action on their part. To the extent that any segregation exists in the system today which is traceable to actions of the board at the time when they were operating a dual system, then they have an obligation to remove that segregation. To the extent that any segregation exists in the system as a result of present action or inaction on the part of the board, then they have an obligation to remove that segregation.

* * * * *

. . . A unitary school system is simply an attempt to visualize what the Chattanooga school system would have looked like today had there been no white children and had there been no black children, but only just children. . . .

With this model of a school system built and structured only to serve and educate children and not to educate black children and not to educate white children, but educate just children, we must seek to restructure our present schools as nearly as feasible and as nearly as possible along these lines, with zone lines being drawn and all other available means of desegregation being used to the extent necessary to achieve the model. When all present segregation that is the result of either past action of school au-

thorities and school boards, including action that occurred when a dual school system was operated pursuant to law, and/or that which is the result of action or inaction on the part of the present school board, including the obligation of that Board to eliminate the results of previously state-imposed segregation, we will have achieved a unitary system, as I understand that term, and as it appears to be defined in the cases.

Pursuant to these instruction, the Board of Education submitted a proposed plan for further and final desegregation of the Chattanooga public schools, the plaintiff's having previously submitted their proposed plan. The respective plans were considered by the Court and an opinion was entered approving a substantial portion of the Board of Education's plan, including that portion of the plan relating to the transportation of students electing to transfer from a school in which they were of the majority race to a school in which they would be in the minority race, all as explicitly mandated by the unanimous decision of the United States Supreme Court in the *Swann* case, supra, and including that portion of the plan relating to the transportation of students where rezoning of elementary schools was deemed to render such transportation convenient or necessary. Neither "racial balance" nor crosstown bussing to accomplish "racial balance" was ordered or approved. The opinion of the Court upon these matters was entered July 26, 1971. See Mapp v. Board of Education of the City of Chattanooga, Tennessee, 329 F.Supp. 1374 (E.D.Tenn.1971). An appeal is now pending in the United States Court of Appeals for the Sixth Circut with regard to that opinion.

[1] No issue has heretofore been raised in this case regarding the legality of providing for transportation of students as a part of a plan for achieving a unitary school

system. If issues exist in this regard they should be presented in this case. They may be presented in the United States Court of Appeals where issues in regard to this phase of the plan are now in contention. It is clear however that a Federal Court may not be ousted of jurisdiction nor may its jurisdiction be by-passed or circumvented when the case involves federal constitutional issues. See Thomason v. Cooper, 254 F.2d 808 (8th Cir. 1958).

[2] All parties named as plaintiffs or as defendants in the state court litigation in the case of John E. Grannan, Jr. vs. the City of Chattanooga, Tennessee, et al., No. N-15967 in the Circuit Court for Hamilton County, Tennessee, including the attorneys for the plaintiff therein, must be immediately joined as parties-defendant to this litigation and they must be called upon forthwith to show cause why they should not be enjoined from complying with or seeking to enforce the order entered in that cause purporting to enjoin the use of public funds for the transportation of students pending the litigation of that issue in these proceedings.

This Court has at all times sought to limit the parties to this litigation to those essential to its litigation, leaving out of the litigation those public officials not immediately and directly responsible for the operation of the Chattanooga public schools. Accordingly, neither the members of the City Commission nor the United States Department of Health, Education and Welfare have been made parties to these proceedings. Rather the Court has sought to leave to those public officials who are directly responsible for the operation of the Chattanooga public schools the maximum authority and responsibility for the operation of those schools, subject only to the requirement that that operation be consistent with the United States Constitution as interpreted by the United States Supreme Court. It is with

sincere regret that the Court must now add further parties-defendant to this litigation, including additional public officials of the City of Chattanooga. This Court is not permitted, however, either by its oath or by its conscience to ignore or to disregard the requirements of the United States Constiution, including the Equal Protection Clause of that Constitution. Neither is it permitted to substitute its personal views regarding matters of constitutional interpretation for the decisions of the United State Supreme Court in regard thereto. Neither can it permit others to do so in matters pertaining to this litigation.

The plaintiff will accordingly file forthwith a petition adding as parties-defendant to this cause all those who are named as parties-plaintiff or defendant in the aforesaid case of John E. Grannan, Jr. vs. The City of Chatanooga, Tennessee, et al., No. N-15967 in the Circuit Court for Hamilton County, Tennessee, including the attorneys for the plaintiff therein. An order will thereupon issue requiring that the said parties appear forthwith to show cause why a temporary restraining order should not issue enjoining them from compliance with or enforcement of the state court order pending further proceedings and further orders in this cause.

It is so ordered.

OPINION

Upon July 26, 1971, this Court entered its opinion upon all matters then before the Court in this case. See Mapp v. Board of Education of the City of Chattanooga, Tennessee, 329 F.Supp. 1374. The order entered upon that opinion is now pending upon appeal. At the time that order was entered the following matters were reserved for further consideration by this Court: (1) matters relating

to the schedule for full implementation of that portion of the School Board plan relating to student assignments in elementary and junior high schools; (2) tentative approval only was given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman Technical High School, which was found to be a unitary school and to which final approval was given. There accordingly remain to consider matters relating to final approval of the plan for desegregation of the four general purpose high schools; and (3) matters relating to the plaintiffs' claim for recovery of attorney fees from the defendant School Board.

Reports, affidavits, and briefs have now been filed regarding the matters remaining for decision as summarized above. Upon December 14, 1971, the plaintiff filed a motion for further relief which substantially reasserts the foregoing matters.

In addition, a further issue was injected into the case by recent motions filed by each party seeking to enjoin a state court judgment alleged to impede or interfere with the desegregation plans heretofore approved in this case. Thereupon an order was entered directing the joinder of additional parties as parties defendant to this case and ordering that the said additional parties should appear and show cause why they should not be enjoined from the enforcement of or compliance with a certain judgment entered in a state court and to which lawsuit they were each parties or counsel for parties.

Taking up first the matters just referred to, that is, the defendant's motion for instructions and the plaintiff's motion seeking to enjoin compliance with or enforcement of an order entered in the state court, reference is made to this Court's instructions and orders entered upon January 25 and 26, 1972. Pursuant to these instructions and orders

of this Court, there have now been added as additional parties defendant to this lawsuit all parties to that certain state court proceeding entitled "John E. Grannan, Jr. v. City of Chattanooga, Tennessee, et al." #N-15967 in the Circuit Court for Hamilton County, Tennessee, including the plaintiff, John E. Grannan, Jr., each of his counsel of record, and including the City of Chattanooga, its Mayor, each City Commissioner, and the City Auditor. Upon January 28, 1972, a hearing was held wherein the original parties were present or represented by counsel and wherein each new party defendant was present in person and by counsel except Commissioner Rose, who had sought and obtained permission to be excused but who was represented by counsel. The City of Chattanooga was represented by corporate counsel. One of the attorneys of record for the plaintiff Grannan in the state court proceedings, Ray Dodson, having disclaimed at the show cause hearing any interest in the state court judgment or proceedings, was dismissed as a party defendant to this case. The purpose of the hearing was to call upon the newly added parties defendant to show cause why a temporary injuction should not issue enjoining and restraining them from enforcement of or compliance with the order entered in the aforesaid case of John E. Grannan, Jr. v. City of Chattanooga. Upon the basis of the pleadings and the record made upon that hearing, the following matters appear undisputed.

Upon December 9, 1971, a lawsuit was filed in the Circuit Court for Hamilton County, Tennessee, in the aforsaid case of John E. Grannan, Jr. v. City of Chattanooga, et al. Upon January 18, 1972, a final judgment was entered in that case purporting to permanently enjoin the City of Chattanooga and its officials from using public funds "for the purpose of transporting pupils in order to achieve a racial balance within the Chattanooga Public School System."

According to that final judgment a trial was held in the state court upon January 14, 1972, just 35 days after the filing of the original lawsuit. Reference is made to "Exhibit B" to the plaintiff's petition for a full and true copy of the state court final judgment. The legal basis for the state court judgment, as cited an the face thereof, is (1) Section 49-2201 of the Tennessee Code Annotated; (2) Section 1232 (a) of Title 20 of the United States Code, and (3) "sanity, reason, and the health and well being of the children."

At the time of the show cause hearing in this court the only counsel to speak in support of the validity of the state court order was counsel for the plaintiff therein. Counsel for the City of Chattanooga and for other city officials who were parties defendant in the state court proceedings, stated that he was of the opinion both prior to and after the entry of the state court order that the order was a wholly void and unconstitutional order. Although specifically invited by this Court to do so, no other party or legal counsel present at the hearing, including the Mayor of the City of Chattanooga who is himself an attorney, spoke in support of the validity of the state court order. It was further represented at the show cause hearing, however, that within a matter of days after entry of the state court judgment a public announcement was authorized and made on behalf of the City of Chattanooga and other defendants in the state court proceedings that no appeal would be taken from the state court judgment and that the said defendants expected to fully comply therewith.

[3] Upon the basis of the foregoing undisputed record, it is perfectly clear that the aforesaid state court judgment seeks to interfere with or impede the orders entered in this case and that the state court judgment is unconstitutional upon its face in that it is in direct conflict with the unani-

mous decisions of the United States Supreme Court written by Chief Justice Burger in the cases of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554; McDaniel v. Barresi, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 582; and North Carolina Board of Education v. Swann, 402 U.S. 53, 91 S.Ct. 1284, 28 L.Ed.2d 586, all of which were entered upon April 20, 1971. It should be noted in passing that these decisions were entered more than six months prior to the filing of the lawsuit in the state court.

[4] Although these decisions are sometimes referred to by persons not knowledgeable in the law as "mere precedents," all persons with either knowledge of or respect for the law are fully aware that these unanimous decisions of the United States Supreme Court are the *law* of the land, binding upon every person in the land, and every court in the land, including the state courts of Hamilton County, Tennessee and this Court. These matters are so clear as to render any contention to the contrary frivolous upon its face.

In the decision of the United States Supreme Court entered in the case of North Carolina Board of Education v. Swann, *supra,* the Court unanimously held that a state statute having the identical purpose as the Tennessee statute recited as the basis for the court order in Grannan v. City of Chattanooga was unconstitutional, saying:

> "However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishment of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."

Not only does Section 1232 (a) of Title 20, United States Code, cited in the state court judgment show on its face

that it has no application to state and local officials in school desegregation cases, but the United States Supreme Court in a unanimous opinion written by Chief Justice Burger in the case of McDaniel v. Barresi, *supra,* clearly so stated in regard to an almost identical statute in the Civil Rights Act of 1964, saying:

> "Nor is the board's plan barred by Title IV of the Civil Rights Act of 1964. The sections relied upon by the respondents [42 U.S.C. §§ 2000c (b), 2000c (6)] are directed only at federal officials and are designed simply to foreclose any interpretation of the Act as expanding the powers of federal officials to enforce the Equal Protection Clause. *Swann,* 402 U.S. at 15, [91 S.Ct. at 1276], 28 L.Ed.2d at 567. Title IV clearly does not restrict state school authorities in the exercise of their discretionary powers to assign students within their school systems."

Finally, the contention that the use of public funds for student transportation is contrary to "sanity, reason, and health and well being of the children" is directly contrary to the decision of the United States Supreme Court in the case of Swann v. Charlotte-Mecklenburg Board of Education, *supra,* wherein the Court stated:

> "Bus transportation has been an integral part of the public education system for years, and was perhaps the single most important factor in the transition from the one-room schoolhouse to the consolidated school. Eighteen million of the nation's public school children, approximately 39%, were transported to their schools by bus in 1969-1970 in all parts of the country."

The City of Chattanooga has for years financed transportation of students, long prior to this desegregation lawsuit. Likewise, Hamilton County, Tennessee, schools have furnished transportation for children and is now doing so. It is obvious that the only transportation of students objected

to in the state court order is that transportation which may further the removal of racial discrimination in the schools. When dual school systems were being operated, no contention was then made that transportation used to keep the races apart was contrary to "sanity, reason and health and well being of children." Counsel for the defendant Grannan himself, the only counsel to make any contention in support of the state court order, admitted that transportation of students to further municipal annexation is lawful and proper. To seek to argue that transportation of students in furtherance of a municipal annexation ordinance is lawful and valid but transportation of the same students in furtherance of the Equal Protection Clause of the United States Constitution is unlawful needs only to be stated to demonstrate its irrationality.

An order must accordingly enter enjoining all parties from either seeking to enforce or in any manner complying with the judgment entered in the case of John E. Grannan, Jr. v. City of Chattanooga, Tennessee, et al., #N-15967 in the Circuit Court of Hamilton County, Tennessee, the said judgment being void and unconstitutional on its face.

[5] With regard to the injunction to be entered herein, there remains only to consider the issue of the taxation of costs as to this phase of the lawsuit and whether the legal expenses incurred by any party by reason of these proceedings should be taxed as a part of the costs and, if so, to whom. To advance contentions and to undertake proceedings which parties or their legal counsel know to be directly contrary to specific, clear, and controlling decisions of the United States Supreme Court and which are designed to delay or impede the proceedings or orders of this Court is an act of bad faith upon the part of those parties or their counsel who may so act, and, when established in the record, will be grounds for awarding all costs in such

proceedings against parties or their attorneys so found to have acted in bad faith, such costs to include the legal expenses incurred on behalf of all parties not found to have acted in bad faith. The case will remain before this Court only for resolution of any issues regarding costs. All other matters in regard to this phase of the lawsuit, if any, must be taken up in the United States Court of Appeals where the case is now pending on appeal.

Turning to the matters heretofore reserved following entry of the Court's opinion upon July 26, 1971, and as summarized at the beginning of this memorandum, it appears that full implementation of the student assignment plans heretofore approved has not been accomplished as yet in certain elementary and junior high schools. It further appears that the delay in this regard has been occasioned by the unavailability of funds "in the prompt and orderly process of local governmental affairs," as directed by the Court, the delay in this regard having been occasioned in very substantial part by the uncertainties regarding various programs of federal aid to education. Accordingly, the provisions for full implementation of the plan for student desegregation as contained in paragraph 4 of the order entered upon August 5, 1971, will continue in effect with the further provision that full implementation will be accomplished not later than the fall term of school in 1972, subject, of course, to the rights of the parties to present in the appeal now pending any matters in regard thereto.

Tentative approval only having heretofore been given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman Technical High School (to which final approval has been given). Further consideration must be given to this phase of the plan. At the time that the Court gave its tentative approval to the high school desegregation plan, the Court desired additional informa-

tion from the Board of Education as to whether three, rather than four, general purpose high schools would be feasible or desirable in Chattanooga. It now appears, and in this both parties are in agreement, that three general purpose high schools rather than four is not feasible or desirable, at least for the present school year. Having resolved this matter to the satisfaction of the Court, the defendant Board of Education will accordingly submit a further report on or before June 15, 1972, in which they either demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of "present or past discriminatory action on their part" Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d 554 at 572, or otherwise, and to the extent that the Board is unable to demonstrate that such racial imbalance which remains is not the result of past or present discriminatory action, they should submit a further plan for removal of all such remaining racial discrimination, the further plan likewise to be submitted on or before June 15, 1972.

[8] Turning finally to the motion for the allowance of attorney fees for all legal services performed on behalf of the plaintiffs since the filing of this lawsuit, the Court is of the opinion that the motion should be denied. In the absence of a showing of bad faith on the part of the defendants, the Court is of the opinion that the allowance of attorney fees would not be proper. This lawsuit has been in an area where the law has been evolving, and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law. For example, in all of its orders entered prior to the decision of the United States Supreme Court in the case of Green v. School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), this Court was itself of the opinion that genuine freedom of choice

on the part of students in school attendance was compliance with the Equal Protection Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been resolved, the Board has at all times complied or attempted to comply in good faith with the orders and directions of the Court. Accordingly, it has never been necessary for this Court to direct that outside persons or agencies, such as the United States Department of Justice or the United States Department of Health, Education, and Welfare, enter into the lawsuit in aid of the development of a lawful plan of desegregation or in aid of enforcement. As recently as in its opinion entered upon July 26, 1971, the Court had this to say:

> "The wisdom and appropriateness of this procedure (i.e., looking to the School Board for the development of a desegregation plan) is further enhanced in this case by the apparent good faith efforts of the Chattanooga school authorities and the School Board to come forward with a plan that accords with the instructions of the Court and its order of May 19, 1971, and with the appellate guidelines therein cited."

Under these circumstances the Court is of the opinion that an award should not be made taxing the defendant Board of Education with the plaintiff's attorney fees.

In conclusion, it appears appropriate for the Court to once again state in simple and basic terms the things it has and has not done in this case.

Acting pursuant to the Equal Protection Clause of the United States Constitution and the unanimous decision of the United States Supreme Court in the case of Swann v. Charlotte-Mecklenburg Board of Education, this Court has ordered the removal of all vestiges of racial discrimina-

tion in the Chattanooga City Schools where such discrimination was shown to have been created by past or present actions of the state or local government. Nothing more nor nothing less than this has been ordered. Where school zone lines were shown to have been deliberately drawn upon racial lines, either as a carryover from the days when a dual system of schools was operated for white and black children, or otherwise, the redrawing of school zone lines was ordered. In some instances this was done on the basis of pairing or grouping schools. Where transportation of students was shown to be necessary in getting children to the school to which they were zoned, such transportation was approved. No child has ever been ordered by this Court to use school provided transportation. Each child has been ordered to attend the school to which he or she is zoned, a requirement that has been followed since the beginning of public education in this City and in this Nation. When persons attempted to interfere with or prevent the removal of racial discrimination in the Chattanooga Public Schools by means of an illegal and unconstitutional state court order, enforcement of that order was enjoined.

An order will enter in accordance with this opinion.

Nos. 71-2006, 71-2007, 72-1443 & 72-1444

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES JONATHAN MAPP, ET AL., *Plaintiffs-Appellants and Cross-Appellees,* v. THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, ETC., ET AL., *Defendant-Appellee and Cross-Appellant.*	APPEAL from the United States District Court for the Eastern District of Tennessee, Southern Division.

Decided and Filed April 30, 1973.

Before: PHILLIPS, Chief Judge, WEICK, EDWARDS, CELEBREZZE, PECK, MCCREE, MILLER, KENT and LIVELY, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge, in banc.

PER CURIAM. This is a school desegregation case involving the school system of Chattanooga, Tennessee.

The present appeals are from the decisions of District Judge Frank W. Wilson reported in 329 F. Supp. 1374 (E.D. Tenn. 1971) and 341 F. Supp. 193 (E.D. Tenn. 1972). Appeals have been perfected by the City Board of Education and by the City of Chattanooga and its Mayor. An appeal also has been perfected by the plaintiffs from

the decision reported at 329 F. Supp. 1374 (E.D. Tenn. 1971).

The appeals originally were heard by a panel of three judges of this court, whose decision was announced on October 11, 1972. The majority opinion of the panel remanded the case to the District Court for further consideration. The dissenting opinion favored affirmance of the judgments of the District Court. Thereafter, a majority of the judges of this court who are in regular active service ordered that the appeals be reheard by the court in banc. FED. R. APP. P. 35, Local Rule 3 (b) of this court provides that: "The effect of the granting of a rehearing in banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket as a pending appeal."

The comprehensive reported opinions of District Judge Wilson contain a full statement of the issues and pertinent facts, and repetition in this opinion is not required.

Upon consideration of the briefs of the parties, the oral arguments before the court sitting in banc, and the entire record, we affirm the judgments of the District Court for the reasons stated in the opinions of Judge Wilson. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Davis* v. *Board of Commissioners*, 402 U.S. 33 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971); *Brown* v. *Board of Education* [*II*], 349 U.S. 294 (1955), *Brown* v. *Board of Education* [*I*], 347 U.S. 483 (1954); *Northcross* v. *Board of Education of Memphis City Schools*, 466 F.2d 890 (6th Cir. 1972); *Kelley* v. *Metropolitan Board of Education of Nashville & Davidson County, Tennessee*, 463 F.2d 732 (6th Cir.), *cert. denied* 409 U.S. 1001 (1972); *Davis* v. *School District of City of Pontiac*, 443 F.2d 573 (6th Cir.), *cert. denied*, 404 U.S. 913 (1971).

The Board of Education has filed a supplemental record in this court containing statistics said to reflect changes which have occurred after the decisions of the District Court. We decline to consider these statistics in the present appeal. Appropriate relief required by changed conditions is a matter for presentation to and consideration by the District Court. We reemphasize the holding of this court in *Kelley* v. *Metropolitan Board of Education of Nashville and Davidson County, supra*: "Like most decrees in equity, an injunctive decree in a school desegregation case is always subject to modification on the basis of changed circumstances." 463 F.2d at 745-46.

Affirmed. Since both parties appealed, no costs are taxed.

MILLER, Circuit Judge, concurring in the result.

I concur in the result reached by the Court in these appeals.

As I read the opinion of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), where vestiges of state-imposed segregation still exist, the district courts have broad powers to fashion remedies that will assure a unitary school system.

A careful review of the record in this case indicates to me that the district judge was not only clearly justified in holding that vestiges of state-imposed segregation still existed in the Chattanooga system, but that he did not abuse his discretion in fashioning remedies within the precepts of the *Swann* decision. Since for these reasons I concur in the result, I do not feel committed to all of the language, reasons and conclusions set forth in the per curiam opinion of this Court or in the two opinions of Judge Wilson under review reported at 329 F.Supp. 1374 (E.D. Tenn., 1971) and 341 F.Supp. 193 (E.D. Tenn., 1972).

WEICK, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge, dissenting.

As members of the original panel who wrote the majority opinion from which the en banc hearing was ordered, we respectfully dissent.

Following the en banc hearing, the District Court's opinion was affirmed, per curiam, without, in our opinion, adequate discussion of the assignment of errors or the merits of substantial and important issues raised on appeal by the School Board and the Board of Commissioners of the City of Chattanooga. The Commissioners were the taxing authority; however, the Board of Commissioners was not made a party initially, but has since been made a party to the judgment without affording it an opportunity to question the merits of the case.

No consideration was given to the supplemental record certified to this Court by the District Court indicating substantial changes in conditions affecting the school system, brought about by mobility of both white and black families, which changes in our judgment impel a remand for consideration before we place our stamp of approval on the District Court's opinions.

We consider it right to say preliminarily that, in our view, no decision of the United States Supreme Court has held that in all events *and without reference to the good faith and good conduct of the involved school or other state or municipal authorities*, there must always be bussing to bring about a mix of the races. *Goss* v. *The Bd. of Educ. of the City of Knoxville, Tenn.*, — F.2d — (6th Cir., No. 72-1766-1767, decided Mar. 29 1973).

In the case before us, the District Judge found that the Chattanooga School Board was guilty of no bad faith and that up to February 4, 1972, the Board had, in fact, established a unitary school system "within which no person is

to be effectively excluded from any school *because of race or color.*" This was the command of *Alexander* v. *Holmes County Board of Educ.*, 396 U.S. 19, 20 (1969).

The District Judge's opinion dealing with the Chattanooga Board's good faith (not reported) had this to say:

> "This lawsuit has been in an area *where the law has been evolving*, and the Court cannot say that the defendants have acted in bad faith in failing always to *perceive* or *anticipate* that *development* of the law. For example, in all of its orders entered prior to the decision of the United States Supreme Court in the case of *Green* v. *School Bd. of New Kent County*, 391 U.S. 430 . . . (1968), this Court was itself of the opinion that genuine freedom of choice on the part of students in school attendance was compliance with the Equal Protection Clause of the Constitution. While the Board has vigorously contested the plaintiff's contentions at every stage of this lawsuit, it further appears to the Court that when factual and legal issues have been resolved, the Board has at all times complied or attempted to comply in good faith with the orders and directions of the Court." (Emphasis added).

There seems now to have developed a view that since *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), nothing other than bussing will satisfy the original command of *Brown I* and *Brown II*. This is not so. In the *Swann* decision the District Court found that the school authorities there involved had flouted the *Brown* commands. His opinion cannot be read as other than a finding that the school authorities were deliberately maintaining *de jure* segregation. The opposite is true in Chattanooga. *Swann* did no more than affirm the District Judge's finding of deliberate creation or perpetuation of *de jure* segregation.

We do not read *Swann* as holding that the Constitution requires that, black or white, a school child must now be

denied the right to attend the school of his choice – desirable because of its nearness to his place of residence, or for any other circumstance prompting such choice – *solely because of the color of his skin.* In our view such a holding would collide with the commands of *Brown I and Brown II,* 347 U.S. 483 (1954) and 349 U.S. 294 (1955).

Can obedience to *Brown I* and *Brown II* be accomplished only by imposition of an Attainder upon so many whose only contribution to the wrongs sought to be alleviated by *Brown* derives from the circumstance of their birth? What will be the dimensions of such selective attainting of some, but not others, among the groups that make up our total society?

We have set out above that the District Judge believed that in Chattanooga the schools had been desegregated and that a unitary system had been established. We have affirmed such holding. *Mapp* v. *Board of Educ. of City of Chattanooga,* 373 F.2d 75 (1967).

The District Judge then went on to say:

> "This lawsuit has been in an area where the law has been evolving and the Court cannot say that the defendants have acted in bad faith in failing always to perceive or anticipate that development of the law."

Must every School Board now be expected, clairvoyantly, to guess what new judicial device may be considered by a District Judge to be a better way of serving desegregation, and make fresh adjustments if such device is found permissible by some appellate court? Across the nation, especially in the cities, rapid population shifts have brought about new concentrations of racial groups. Must the courts be ready to move in with fresh commands and new rerouting of buses? The chaos that can be the result is forecast by Chief Justice Burger's language in *Swann.*

"It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; *but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools,* further intervention by a district court should not be necessary." (Emphasis added.) (402 U.S. at 31, 32.)

We must therefore consider the issues raised on appeal.

I

THE QUOTA SYSTEM

The District Court misconstrued recent decisions of the Supreme Court as requiring racial quotas in the public schools. It ordered "a racial ratio of not less than 30% nor more than 70% of any race in each elementary school within the system with but five exceptions . . . ." 329 F. Supp. 1374, 1382. The five schools excepted therefrom were found not to be imbalanced on account of past or present discrimination. Similar quotas were ordered for Junior High Schools. Senior High Schools are still under consideration.

In our opinion, the decision in *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971), on which the District Court relied, does not mandate the adoption of

quotas in each and every school in the system regardless of where the children reside.

Mr. Chief Justice Burger, who wrote the opinion for the Court said:

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." (402 U.S. at 24).

In *Winston-Salem/Forsyth Bd. of Educ.* v. *Scott,* 404 U.S. 1221 (1971), in an Opinion in Chambers, Chief Justice Burger, after quoting the above language from *Swann,* stated:

> "Nothing could be plainer, or so I had thought, then *Swann's* disapproval of the 71%-29% racial composition found in the *Swann* case as the controlling factor in the assignment of pupils, simply because that was the racial composition of the whole school system." (404 U.S. at 1228).

Chief Justice Burger further said:

> "The present status of the findings is not clear to me, but the District Court on reconsideration following the remand seems to have thought that it was compelled to achieve a fixed racial balance reflecting the composition of the total county system. The explicit language of the Court's opinion in *Swann* suggests a possible confusion on this point. I do not attempt to construe that language, but simply to recite it verbatim: 'The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of

the school system as a whole.' 402 U.S. at 24." (404 U.S. at 1230-1231).

In *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *affirming* 244 F.Supp. 572 (S.D. Ohio, 1965), *cert. denied*, 389 U.S. 847, we stated:

> "Moreover, our refusal to restrict the school board with a mathematically certain formula for the vindication of individual constitutional rights is not an innovation. The right to a trial by an impartial, fairly selected jury, is well established in our law and it has been protected against the same sort of disguised racial discrimination that has been attempted in the school desegregation cases. Eubanks v. State of Louisiana, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991 (1958); Smith v. State of Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940); Norris v. State of Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935); Ex parte State of Virginia, 100 U.S. 339, 25 L.Ed. 676 (1879); Strauder v. State of West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879).
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> However, it is equally clear that a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which is to try him nor on the venire or jury roll from which petit jurors are to be chosen. Swain v. State of Alabama, 380 U.S. 202, 208, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); Akins v. State of Texas, 325 U.S. 398, 403, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945). While the two situations may not be completely analogous, the potential dangers to a criminal defendant, forced to face a racially imbalanced jury, are at least as great as the intangible, often speculative injuries threatening a student in a racially imbalanced school." (369 F.2d at 61-62).

The trouble is that the quota system, which in our

judgment is alien to a free country, has been extended to other fields and with discriminatory and disastrous results.[1]

We see no occasion for the District Judge to rely on the drastic order of Judge McMillan considered in *Swann, supra*, or that of Judge Merhige, reversed in *Bradley*.[2]

The District Court was obviously influenced by the fact that the Supreme Court in *Swann* affirmed a very broad order of District Judge McMillan. This appears from a colloquy between the Court and counsel for the Board, at the evidentiary hearing, as follows:[3]

> "THE COURT: Well, what is your question about what they did? Did they or did they not approve all of the procedures that had been followed in the Mecklenburg case?
>
> MR. WITT: They placed great —
>
> THE COURT: Well, just answer my question, did they or did they not approve every single procedure followed in the Mecklenburg case.
>
> MR. WITT: Yes.
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> THE COURT: So is there any question about what they did?
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> MR. WITT: Yes." (Tr. 1693-19-20)

But the Supreme Court in *Swann* pointed out the background of defiance by that Board which occasioned the broad order:

> "As the voluminous record in this case shows, the predicate for the District Court's use of the 71% —

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[1] Ross, "Why Quotas Won't Work," Reader's Digest, Feb. 1973, page 51: "Current effort to atone for past discrimination against minorities is creating new victims by reverse discrimination. Can two wrongs make a right?"

[2] *Bradley* v. *School Board of Richmond*, 462 F. 2d 1058 (4th Cir. 1972), *cert. granted*, Jan. 15, 1973, 41 U.S.L. Week 3391.

[3] See 83 Harvard Law Review 81, 82.

> 29% ratio was twofold: first, its express finding, approved by the Court of Appeals and not challenged here, that a dual school system had been maintained by the school authorities at least until 1969; second, its finding, also approved by the Court of Appeals, *that the school board had totally defaulted in its acknowledged duty to come forward with an acceptable plan of its own, notwithstanding the patient efforts of the District Judge, who, on at least three occasions, urged the board to submit plans.*" (Emphasis added.) (Footnotes omitted) (402 U.S. at 24).

In our case, prior to the entry of the orders from which these appeals had been taken, no child was excluded from any school on account of color or race. The District Court found that the Board has acted in good faith and has at all times "complied or attempted to comply with the orders and directions of the Court." The Board was not in default. This distinguishes *Swann*.

The quota system results in the violation of the constitutional rights of innocent black children and white children in order to redress past violations of the constitutional rights of the plaintiffs. Both black and white children, without their consent or that of their parents, are forced by judicial fiat to be transported away from their homes and neighborhood schools to other strange places and schools, solely because of the color of their skin. These innocent children have committed no offense to justify such treatment.[4] Plaintiffs seem to recognize this fact because one of the assignments of error in their appeal was their claim that the District Court erred in ordering the closing of black schools without ordering a sufficient number of white schools closed. Plaintiffs' brief states:

[4] Many black people oppose forced bussing of their children. At the National Black Political Convention, held in Gary, Indiana (March, 1972), mandatory bussing and school integration were condemned as racist and as preserving a black minority structure.

"Thus, black youngsters will be required to leave their neighborhoods to go to other schools for all grades or for grades 1-3 in numbers disproportionate to the numbers of blacks." (Plaintiff-Appellants' brief, p. 30).

There is no provision in the Constitution which can be read as saying that the races must be mixed in each and every school in the system, and no provision requiring that white children be bussed away from their neighborhood schools in the suburbs, to schools in the inner city, or that black children must be bussed away from their neighborhood schools to schools in the suburbs, in order to achieve a racial mixture or quota.

The Board can hardly be faulted for housing patterns of a community or for the concentration of blacks in the inner city, as these conditions exist in other cities throughout the country, regardless of the type of school system in operation, *i.e.*, whether *de jure* or *de facto*.

In his book, "Negroes In Cities," Dr. Karl Taeuber states that residential segregation exists "regardless of the character of local laws and policies and regardless of other forms of discrimination." He said substantially the same thing in his article, "Residential Segregation," in the August, 1965 issue of Scientific American.

In *Bradley* v. *School Board of City of Richmond*, 462 F.2d 1058 at 1066, (4th Cir. 1972), *cert. granted*, Jan. 15, 1973, 41 U.S.L.Week 3391, the Court said:

"[T]he root causes of the concentration of blacks in the inner city are simply not known . . . ."

And

"Whatever the basic causes, it has not been school assignments and school assignments cannot reverse that trend."

It is, of course, popular to blame the Boards of Education for everything, but it is unfair to require the educational system to dismantle this condition for which it was in no wise responsible.

II

UNITARY SCHOOL SYSTEM

Unlike the District Court, we have experienced difficulty in understanding not only what constitutes a unitary school system, but also what steps the Constitution requires must now be taken to eliminate a *de jure* system and to bring about a unitary system. Other Judges, legal scholars and writers have had similar difficulty.[5] We suggested in *Northcross* that the Supreme Court had not defined a unitary school system. *Northcross* v. *Board of Educ. of Memphis, Tenn. City Schools,* 420 F.2d 546 (6th Cir. 1969). We were corrected in a concurring opinion written by Chief Justice Burger, wherein he said:

> "The suggestion that the Court has not defined a unitary school system is not supportable. In *Alexander* v. *Holmes County Bd. of Educ.,* 396 U.S. 19 (1969), we stated, albeit perhaps too cryptically, that a unitary system was one 'within which no person is to be effectively excluded from any school *because of race or color.*'" *Northcross* v. *Bd. of Educ. of Memphis, Tenn.,* 397 U.S. 232 at 236-7 (1970). (Emphasis added).

Under this definition the School Board already had achieved a unitary system long before the entry of the orders from which the appeals were taken. While this did not establish racial quotas, or a mixture in all of the

[5] 85 Harvard Law Review 3, 74, 76, 81, 83.

schools as desired by plaintiffs, *no pupil was excluded from any school on account of his color or race.* This is all that *Brown I* and *Brown II* ever contemplated.[6] These decisions, in our judgment, did not envision the use of school children to bring about an integration of the races.

III

MAXIMIZING INTEGRATION

The District Court required the Board to establish that it had taken affirmative action to "maximize integration" in all feasible ways as required by *Kelley*[7] and *Robinson.*[8] The Supreme Court in *Davis* v. *Board of School Comm'rs of Mobile County,* 402 U.S. 33 (1971), held that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." (402 U.S. at 37). We have not found where the Supreme Court has ever required School Boards to "maximize integration". The difficulty is that the District Court may well have understood the words to require integration of the races by fixed numbers or quotas in each public school in the system, regardless of where the pupils live, and regardless of their economic circumstances. This can be accomplished only by extensive and expensive bussing and by violation of the constitutional rights of both races.

If it is desirable to integrate the races, why not start with adults, rather than to pick on defenseless school children? Of course, it would take an Act of Congress to

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[6] *Brown I,* 347 U.S. 483 (1954); *Brown II,* 349 U.S. 294 (1955).

[7] *Kelley* v. *Metropolitan County Bd. of Educ. of Nashville & Davidson County,* 436 F.2d 856 (6th Cir. 1970).

[8] *Robinson* v. *Shelby County Bd. of Educ.,* 442 F.2d 255 (6th Cir. 1971).

compel adults to integrate. We doubt that Congress could ever be persuaded to pass such legislation, and if it were so persuaded, such law would clearly be unconstitutional, in violation of the First Amendment which guarantees freedom of association. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958).

In that case the Court denied enforcement of a state contempt citation against the petitioner, which citation was issued when petitioner refused to disclose its Alabama membership list. The adverse effect on the membership of disclosure of the roster of N.A.A.C.P. was, of course, somewhat speculative. Yet the Court held that the importance of the right of association was so great as to require protection, stating:

> ". . . [S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (357 U.S., at 460-461).

This principle was reaffirmed in *Bates* v. *City of Little Rock,* 361 U.S. 516 (1960). The language in the concurrence of Mr. Justice Black and Mr. Justice Douglas, is instructive.

> ". . . [W]e believe, as we indicated in *United States* v. *Rumely,* 345 U.S. 41, 48, at 56 (concurring opinion), that First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government. One of those rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right as *N. A. A. C. P.* v. *Alabama,* 357 U.S. 449, at 460, and *De Jonge* v. *Oregon,* 299 U.S. 353, at 363, hold. These are principles applicable to *all* people under our Constitution irrespective of their race, color, politics, or religion." (Emphasis added) 361 U.S. at 528.

"*All* people" includes children.

It should be pointed out that there is a marked difference between voluntary bussing and induced or forced bussing in the effect on the children involved and their parents. No one can have any objection to the school system's furnishing voluntary transportation from the child's residence to the school nearest thereto. It is something entirely different when the child, solely because of the color of his skin, is assigned away from his neighborhood school, by a court order, and is required to be transported to another school (whether by his parents' car or by induced bussing) some distance away from his home.

Brown I speaks of the feeling-of-inferiority effect on children as the result of discriminatory state action where the children are not permitted to attend certain public schools because of the color of their skin. This condition would seem to persist still if children of both races are prohibited by court order from attending schools nearest to their residences, merely because of the color of their skin, and are required to be taken elsewhere to school.

IV

BURDEN OF PROOF

Where a dual system has been maintained, the courts have placed the burden of proof upon the School Board to establish that present racial imbalances in a particular school are not the result of past discriminatory actions, although the cases are not very clear as to just how or in what manner the Board can ever meet such a heavy burden. But in a case like ours, where the Board has always complied with the desegregation orders of the Court, and the plaintiffs have filed motions for further relief whenever new decisions have been announced expanding the rights

of plaintiffs in school desegregation cases, it would seem to us to be only fair that plaintiffs should have the burden to prove that they are entitled to such further relief. The Board ought not to have the burden of disproving every contention which the plaintiffs may see fit to make in this case. In our judgment the Court erred in placing on the defendants the burden of proof in resisting plaintiffs' motion for further relief.

V

PRACTICALITIES

In considering desegregation plans the District Court must take into account the practicalities of the proposals. These include the cost thereof, how such proposals may affect the rights of the children involved in the assignments, induced bussing, and the educational achievement of such proposals.

Boards of Education do not have unlimited funds to adopt any program which they please. Funds can be raised by taxation and appropriation. In the present case the Board of Education does not have the power to levy taxes or to appropriate funds to carry out its programs. Only the Board of Commissioners of the City has such power and authority. That Board was not made a party to the case in the District Court until after the desegregation orders had been entered by the Court. We would assume that the Board of Commissioners has already appropriated the funds for the 1972-73 school year. If so, we do not know how an expenditure of $500,000 for buses would affect operation of the schools. The District Court has not ordered the Board of Commissioners to appropriate funds to provide for transportation of pupils, and we do not consider in this appeal the question whether it has the power

to enter any such order. The Board of Commissioners is entitled, on remand, to a hearing on all issues of the case before any order is entered against it.

We would not affirm the District Court's opinions, but would remand for an evidentiary hearing to consider the changed circumstances and to proceed not inconsistent with this opinion.

The District Court also should consider Title VIII of the Education Amendments of 1972, and its prohibition against the use of funds appropriated by Congress for bussing.

In our judgment a quota system can discriminate invidiously in favor of one race against other races. Such a system can lower the quality of education and educational achievement, and instead of bringing harmony and good will between the races can polarize them.